Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
October Term, 1978
No. 78-939

FRANK PALMIERI,
Petitioner,

-against-

EUGENE LeFEVRE, Superintendent Clinton Correctional Facility,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

FRANK PALMIERI,

Appellant,

-against-

EUGENE LeFEVRE, Superintendent
Clinton Correctional Facility,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Frank Palmieri, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on September 20, 1978.

OPINION BELOW

The United States Court of Appeals for the Second Circuit affirmed, without a written opinion, the denial of petitioners application for a writ of habeas corpus by Hon. Eugene H. Nickerson on April 4, 1978 (See, Appendix, *infra,* for the order of the Court of Appeals and the opinion of Judge Nickerson).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Second Circuit was entered on September 20, 1978. The jurisdic-

tion of the Court is invoked under 28 U.S.C. Sec. 1254 Sub. 1. The petition for a writ of certiorari was filed within 90 days of the date of the order of the Second Circuit.

QUESTION PRESENTED

Whether petitioner, an indigent, was deprived of equal protection and due process under the Fourteenth Amendment to the United States Constitution by the failure of the State to provide him with a free transcript of the separate trial of his co-defendant?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the due process clause under the Fifth and Fourteenth Amendments, the right to counsel under the Sixth and Fourteenth Amendments, and the equal protection clause of the Fourteenth Amendment. The pertinent text of each is set forth in the Appendix, *infra.*

STATEMENT OF FACTS

Petitioner and Michael Blake were indicted for the crime of murder; the indictment alleged that on or about January 30, 1968, in Queens County, they caused the death of May Lang while robbing her. On March 18, 1969, following a *Huntley* hearing before the Honorable Albert H. Bosch, Palmieri's application to have his trial severed from that of Blake was granted (Vol. II, 594a).* Blake's trial followed the *Huntley* hearing. Petitioner's attorney, immediately prior to Blake's trial, requested that the court

* Volumes and numbers refer to the pages of the transcript of Palmieri's trial.

provide petitioner, who was indigent, a transcript of Blake's trial. Counsel maintained that he needed the transcript in order to prepare the defense (Vol. II, 595a). The court denied the application but invited counsel to reapply, on written papers, before another judge (Vol. II, 595a-597a). On March 24, 1969, during Blake's trial, counsel made such a motion before the Honorable J. Irwin Shapiro, sitting in the motion part of Queens County Supreme Court. That motion was granted only to the extent that the People were ordered to provide petitioner with Blake's transcript only if they ordered a copy for themselves (See, Appendix *infra*). Petitioner was never provided with that transcript.* Blake was found guilty of murder.**

Petitioner, on May 19, 1969, proceeded to trial before the Honorable Paul Balsam. Although petitioner was represented by different counsel than Blake had been, the same assistant district attorney prosecuted both cases (Vol. VIII, 1291). Petitioner was found guilty of murder and was sentenced to a period of life imprisonment with a minimum of twenty-five years.

In the Appellate Division, Second Department, petitioner urged reversal of his conviction. The appellate Division affirmed without opinion*** and leave was denied by the Court of Appeals.****

Petitioner, in a *pro se* petition for a writ of habeas

* This is evidenced by the fact that petitioner, after his trial, again moved for the State to provide him with Blake's transcript; that application, too, was denied. (See appendix *infra*).

** On August 20, 1969, Blake was sentenced to life imprisonment with a minimum of fifteen years. His conviction was subsequently reversed. 44 A.D. 2d 606 (2d Dept. 1974).

*** 44 A.D. 2d 654 (2d Dept. 1974).

**** April 5, 1974, Stevens, J.

corpus in the United States District Court for the Eastern District of New York, raised the same issues presented in the state courts. In response to petitioner's claim that he was unconstitutionally deprived of a transcript of Blake's trial, Judge Nickerson held:

> Petitioner's third argument is that he, as an indigent, was entitled to a free transcript of the separate trial of his codefendant, as an aid to the preparation of his own case. While the Supreme Court has held that an indigent defendant is entitled to free transcripts of preliminary hearings for trial purposes, *Roberts v. LaVallee,* 389 U.S. 40, 42; 88 S. Ct. 194, 196 (1967), and to free transcripts of trial proceedings for appeal purposes, *Griffin v. Illinois,* 351 U.S. 12, 76 S. Ct. 585 (1956), petitioner cites no case extending this equal protection rationale to the point of entitling an indigent to a free transcript of a co-defendant's trial merely on the theory this may be of some aid to him or his counsel. I do not believe that the state is constitutionally required to provide at its own expense every imaginable aid to the preparation of an indigent defendant's case. *Cf. United States v. MacCollom,* 426 U.S. 317, 96 S. Ct. 2086 (1976).

Judge Nickerson denied Palmieri's petition without a hearing.

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED TO RESOLVE WHETHER AN INDIGENT ACCUSED'S RIGHT TO MINUTES OF ALL PRIOR PROCEEDINGS IN HIS CASE EXTENDS TO MINUTES OF THE TRIAL OF A CODEFENDANT WHERE THE EVIDENCE AGAINST BOTH WAS VIRTUALLY THE SAME.

Petitioner and Blake stood accused of acting in concert in committing the robbery and murder of May Lang. Blake's case was severed and his trial proceeded first. Petitioner, indigent and unable to purchase a transcript of Blake's trial, applied on more than one occasion for the State to provide him with that transcript; his applications were denied. Where the only obstacle petitioner faced in obtaining minutes that were necessary in defending himself against a murder charge was his indigency, the denial of his requests for Blake's transcripts was in violation of his Fourteenth Amendment rights to equal protection and due process and mandates a new trial.*

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* The only reported case found in which this equal protection issue was raised is *United States v. Bamberger,* 482 F. 2d 166 (9th Cir.) cert. denied 414 U.S. 1041 (1973). There the codefendant was tried twice; the first trial resulting in a hung jury. The defendant already had a copy of the transcript of the codefendant's first trial and the court never reached the issue of whether he was entitled to a transcript of the second trial, holding that "any error in its denial was harmless beyond a reasonable doubt." 482 F. 2d at 168. Such clearly is not the case here. Further, petitioner contends, in agreement with the 7th Circuit's ruling in *United States v. Jonas,* 540 F. 2d 566 (7th Cir. 1976), reversing a conviction due to the denial of a free transcript of a prior mistrial, that harmless error analysis is in-

It has long been the law that rich and poor alike must be judged equally when "stand(ing) . . . before the bar of justice . . ." *Chambers v. Florida,* 309 U.S. 227, 241 (1940); *Griffin v. Illinois,* 351 U.S. 12, 17 (1956). "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin, supra.* at 17.

In recognition of this, courts in the past two decades have afforded the poor the necessary tools for preparation of a defense at no cost to them.* As Mr. Justice Black noted in *Griffin,* holding that equal protection and due process required that all defendants have similar access to appellate revie regardless of wealth,

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance.

351 U.S. at 18. See also, *Roberts v. LaValee,* 389 U.S. 40, 42 (1967).

In accord with this principle the Supreme Court held, in *Britt, v. North Carolina,* 404 U.S. 226 (1971), that an indigent defendant was entitled to a transcript of his prior trial, for the same crime, which had resulted in a hung jury.**

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appropriate in this case as the error is of constitutional magnitude and, even if inconsistencies in testimony appear minor, the harm to appellant might be substantial. See, 540 F.2d at 572-573.

* E.g., *Britt v. North Carolina,* 404 U.S. 226 (1971) and other cases cited notes 1-3, at 231 (Douglas J., dissenting). *See generally, Discrimination Against the Poor and the Fourteenth Amendment,* 81 Harv. L. Rev. 435, 435-436 (1967).

**Despite this holding the Court found that *Britt,* under that narrow circumstances of that case, had an adequate alternative available to his transcript. This is not the case here.

> *Griffin v. Illinois,* and its progeny established the principle that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. While the outer limits of that principle are not clear, there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal.

404 U.S. at 227.

The Court set forth two guidelines in determining the right of an indigent defendant to a free transcript. The first is the value of the transcript and the second the availability of alternatives to the transcript. It is clear that in the instant case no alternative to the transcript was available to Palmieri.

As to the first criterion, suffice it to say that a transcript of an alleged accomplice's prior trial is as valuable to a defendant as the transcript of his own prior trial.* The majority in *Britt,* referring to the dissent by Justice Douglas, indicated two ways in which a transcript of a previous trial would be helpful. One, as a discovery device in preparation for trial,** the second as a tool at trial for the impeachment of prosecution witnesses.*** Justice Douglas, at great length, described ways in which a prior trial would be useful to the defense. 404 U.S. 233-41. He

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* Possibly even more valuable, since a defendant and counsel would be present at the defendant's own prior trial.

**Both the Assistant Attorney General in his affidavit in opposition to Palmieri's *pro se* habeas corpus application and the Assistant District Attorney in his brief to the Appellate Division, urged rejection of petitioner's claim to Blake's transcript for this very reason; that it was tantamount to a discovery motion that if made would have been denied.

***404 U.S. at 228.

particularly focused on the importance of such a transcript given the limited discovery rules in State criminal prosecutions.

Here, had Palmieri the funds, he could have simply purchased the transcript of Blake's trial and used that as a discovery and impeachment device. As long as petitioner could have purchased this obviously helpful information, his poverty cannot constitutionally be a bar to his obtaining such a valuable aid in trial preparation.

> A mistrial transcript contains not only prosecution witnesses' names and addresses but their stories under oath and it contains the entire theory of the government's case. Such a document is a complete dossier of the opposing case for which even the most liberalized rules of civil discovery have no equivalent . . . the State may not condition its availability upon financial consideration which effectively deprive the poor of this valuable tool.

404 U.S. at 246 (Douglas, J., dissenting). *Cf., United States ex. rel. Wilson v. McMann,* 408 F. 2d 896, 897 (2d Cir. 1969) (indigent defendant has right to transcript of previous trial resulting in hung jury).

It is unnecessary to examine specifically how counsel may have utilized the earlier transcript for trial purposes. "Our cases have consistently recognized the value to a defendant of a transcript of prior proceedings, without requiring a showing of need tailored to the facts of the particular case." *Britt v. United States, supra.* at 228.* In most cases, there is no difference between the value of a

*New York courts have consistently held that given a timely request for minutes of a prior proceeding, the use to which they may be put is irrelevant. *People v. Zabrocky,* 26 N.Y. 2d 530, 536 (1970). Accord, *People v. Sanders,* 31 N.Y. 2d 463, 466 (1973); *People v. Peacock,* 31 N.Y. 2d 907, 908 (1972); *People v. West,* 29 N.Y. 2d 728, 729 (1971).

transcript of a defendant's own mistrial and that of a previously tried accomplice.

The rule of *Britt* is not based upon some property right, but rather is based upon the obvious need for these minutes. The need of an accused for the minutes of a co-defendant's trial may not always be as great as the need for the minutes of his own prior proceedings, but where, as here, the evidence against the two is almost identical, then the distinction between the two situations is without meaning. Palmieri's need for and potential use of the minutes of Blake's trial was identical to *Britt's* need and potential use of the minutes of his prior trial. To distinguish Palmieri's situation from Britt's is to disregard the reasoning behind *Britt.* Here, many of the same witnesses who testified in Blake's trial, also testified at Palmieri's trial and for both discovery and impeachment purposes, counsel to a wealthy defendant would have been remiss in not purchasing Blake's transcript.* The importance of the transcript of Blake's trial to Palmieri is made obvious by the fact that Blake's attorney did not represent Palmieri while the same assistant district attorney prosecuted both cases. Mr. Justice Shapiro's unusual decision granting Palmieri's application for the transcript of Blake's trial only if the State ordered its own transcript, gave the State the opportunity to deprive petitioner of the transcript without causing the prosecutor any great inconvenience, he being privy to the evidence against Palmieri and having prosecuted Blake, thus presumably having trial notes and knowledge of what the witnesses said. Such a result is patently unfair and is solely the result of petitioner's indigency. Thus, the transcript of Blake's

* A comparison of the Appellate Division's brief in Blake's case and the transcript here, indicates that among the most important common witnesses were many of the police officers, including the officers at the scene and the investigating detectives.

trial is necessary to vindicate Palmieri's legal rights. See, *United States ex. rel. Wilson v. McMann, supra.*

In addition to being violative of petitioner's guarantees of due process of law and equal protection under the law (U.S. Const. Amends. V and XIV), the court's denial of the transcript of Blake's trial deprived Palmieri of his right to counsel. U.S. Const. Amend. VI. *Gideon v. Wainwright,** and its progeny guarantee to indigent defendants not only "paper" counsel but the effective assistance of counsel. *See, In Re Oliver,* 333 U.S. 257, 275 (1945). Aids, to counsel, such as minutes of prior proceedings, are part and parcel of the delivery of effective assistance of counsel. *Right to Aid in Addition to Counsel for Indigent Criminal Defendants,* 47 Minn. L. Rev. 1054 (1963). Here, the State, by denying appointed counsel the tools for Palmieri's defense, deprived him of his right to effective representation.

Although the Fourteenth Amendment was not meant to end all distinctions between rich and poor, it does require that "indigents have an adequate opportunity to present their claims fairly within the adversary system." *Ross v. Moffitt,* 417 U.S. 600, 612 (1974). Palmieri was not given that opportunity. Accordingly, this Court should order the State of New York to provide Palmieri a transcript of Blake's trial and to afford Palmieri a new trial.

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* 373 U.S. 335 (1963).

CONCLUSION

FOR THE FOREGOING REASONS, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX "A"
AMENDMENTS V, VI AND XIV

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "B"
USCA ORDER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of September one thousand nine hundred and seventy eight.

Present:

HON. LEONARD P. MOORE
HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges,

FRANK PALMIERI,

Petitioner-Appellant,

v.

EUGENE LE FEVRE, Warden Clinton Correctional Facility,

Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of

record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk
By: s/Arthur Heller
ARTHUR HELLER
Deputy Clerk

APPENDIX C—MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FRANK PALMIERI,

Plaintiff,

-against-

EUGENE LeFEVRE, Supt., Clinton Correctional Facility,

Respondent.

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77 C 1698

MEMORANDUM AND ORDER

NICKERSON, District Judge

On May 26, 1969, Frank Palmieri was convicted on two counts of murder after a jury trial in Queens County Supreme Court. He now petitions for a writ of habeas corpus, raising precisely the grounds raised on an unsuccessful direct appeal from the judgment of conviction.

Petitioner's first argument is that he was entitled to a new trial because of evidence discovered after the conclusion of the jury trial. This evidence was presented to Mr. Justice Balsam the trial judge, who held two hearings beginning respectively on November 13, 1969, and March 9, 1971, to determine whether the new evidence justified a new trial. By orders dated June 25, 1970 and June 28, 1971, Mr. Justice Balsam reviewed the testimony taken at the hearings and the affidavits submitted by the parties,

and held that a new trial was not warranted. [Record on Appeal, Vol. I., pp. 66a-69a; 91a-95a.] The basis for defendant's motions was the purported recantation of several crucial prosecution witnesses who had testified at trial that Palmieri had admitted committing the crime. However, one of the witnesses who was supposedly ready to recant testified at the second hearing that while in prison on an unrelated charge he had been forced by petitioner's friends to sign a statement saying that he had lied during petitioner's trial. This witness, Harvey Wohl, testified at the hearing that he had testified truthfully at the jury trial and that he would not have signed the purported recantation but fo the coercion. Mr. Justice Balsam found the evidence submitted by the defendant at the hearings not worthy of belief and denied the motions for a new trial.

The mere fact of recantation does not entitle a convicted defendant to a new trial: indeed, recantations are viewed "with the utmost suspicion." *Rice v. Vincent,* 491 F.2d 1326, 1332 (2d Cir.), *cert. denied* 419 U.S. 880 (1974). And the determination on the question of credibility made by Mr. Justice Balsam, who had the opportunity to observe the witnesses at both the trial and the post-trial hearings, should not be disturbed by me on this habeas corpus proceeding.

Petitioner's second argument is that the Assistant District Attorney failed to disclose that his chief witness, Harvey Wohl, was testifying at petitioner's trial as part of a deal worked out between Wohl, Assistant District Attorneys Lombardino and/or Maiolo, and Mr. Justice Thompson with respect to a robbery charge brought against Wohl. Petitioner seems to be arguing that Wohl received an "extremely light" sentence from Mr. Justice Thompson on the burglary charge, and that part of the deal that led to this sentence was a promise by Wohl to

identify petitioner as one of the perpetrators of the murder. However, Mr. Justice Thompson, Assistant District Attorneys Lombardino and Maiolo, and Wohl all testified that no agreement had been reached or even discussed regarding Wohl's testimony in petitioner's case. [Record, Vol. VI, p. 375; Vol. VIII, p. 1336; Vol. V, p. 275; and Vol. III, p. 980a.] Apparently in the course of discussing Wohl's own robbery case with Mr. Justice Thompson and the Assistant District Attorney, Wohl volunteered the information regarding petitioner but, unless all four witnesses are to be disbelieved, this did not form a part of the agreement. As there was no agreement concerning Wohl's testimony at petitioner's trial, there was nothing for the prosecution to disclose.

If Wohl was testifying because of a hope of currying favor with the state authorities rather than out of a sense of civic duty, this was a matter to be brought out on cross-examination of Wohl, and petitioner's trial counsel did in fact try to place this interpretation of Wohl's motives before the jury on cross-examination. [Record, Vol. III, pp. 980a, etc.]

Petitioner's third argument is that he, as an indigent, was entitled to a free transcript of the separate trial of his codefendant, as an aid to the preparation of his own case. While the Supreme Court has held that an indigent defendant is entitled to free transcripts of preliminary hearings for trial purposes, *Roberts v. LaVallee,* 389 U.S. 40, 42; 88 S.Ct. 194, 196 (1967), and to free transcripts of trial proceedings for appeal purposes, *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585 (1956), petitioner cites no case extending this equal protection rationale to the point of entitling an indigent to a free transcript of a co-defendant's trial merely on the theory this may be of some aid to him or his counsel. I do not believe that the state is constitutionally required to provide at its own expense every imaginable

aid to the preparation of an indigent defendant's case. *Cf. United States v. MacCollom*, 426 U.S. 317, 96 S.Ct. 2086 (1976).

Finally, petitioner argues that when the witness Avalos testified that the defendant's nickname was "Animal" this so prejudiced the jury against the defendant that he was denied a fair trial. I note that Mr. Justice Balsam instructed the jury not to draw any inference from this nickname, [Record, Vol. IV, p. 1223a] and I reject this claimed constitutional error as wholly spurious.

The petition is denied. So ordered.

Dated: Brooklyn, New York
April 4, 1978

s/ Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.

The Clerk shall make copies of this Memorandum and Order and serve them upon the parties.

APPENDIX D—JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FRANK PALMIERI,

Plaintiff,

-against-

EUGENE LeFEVRE, Supt. Clinton Correctional Facility,

Respondent.

JUDGMENT 77 C 1698

A memorandum and order of Honorable Eugene H. Nickerson, United States District Judge, having been filed on April 5, 1978, denying the petition for a writ of habeas corpus, it is

ORDERED and ADJUDGED that the petitioner take nothing of the respondent, and that the petition for a writ of habeas corpus is denied.

Dated: Brooklyn, New York
April 7, 1978

s/ Richard H. Weur
Clerk

FILED IN CLERK'S OFFICE U.S. DISTRICT COURT
E.D.N.Y. APR 7-1978

APPENDIX E—ORDERS OF THE STATE COURT

At a Criminal Term, Part I, of the Supreme Court, held in and for the County of Queens, at the Courthouse 125-01 Queens Boulevard, Kew Gardens, New York, on the 24th day of March 1969.

PRESENT: Hon. J. IRWIN SHAPIRO, Justice.

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

FRANK PALMIERI,

Defendant.

Ind. No. 920-68

Motion (1) to furnish transcript minutes of trial of Michael Blake; (2) daily copy

Submitted March 24, 1969

Michael Ruggiero, for the Motion

L. Gresser, A.D.A., Opposed

The following papers numbered 1 to 2 submitted in this motion

	Papers Numbered
Notice of Motion and Affidavits Annexed	1-2

***

Upon the foregoing papers, and for the reasons stated on the record, this motion will be granted and the District Attorney will provide transcript to defendant only if the District Attorney orders copies for himself.

s/ J. Irwin Shapiro
J.S.C.

GRANTED:
Date: March 24, 1969

s/ Paul Livoti

At a Criminal Term, Part I, of the Supreme Court, held in and for the County of Queens, at the Courthouse, 125-01 Queens Boulevard, Kew Gardens, New York, on the 9 day of September 1969.

PRESENT: Hon. EDWARD THOMPSON, Justice.

THE PEOPLE OF THE STATE OF NEW YORK

-against-

FRANK PALMIERI,
MICHAEL BLAKE,

Defendants.

Ind. No. 920-68
Motion for transcript of minutes
Submitted August 11, 1968
Michael Ruggiero, for the motion
Thomas J. Mackell, D.A. Opposed

The following papers numbered 1 to 2 submitted in this motion

	Papers Numbered
Notice of Motion and Affidavits Annexed	1-2

***

Upon the foregoing papers, and the opinion of the Court herein, the motion on behalf of the defendant FRANK PALMIERI is in all respects denied.

s/ E. Thompson
J.S.C.

GRANTED: Date: September 9, 1969
s/ Paul Livoti

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART I

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

FRANK PALMIERI,
MICHAEL BLAKE,

Defendants.

By THOMPSON, J.
DATED September 9, 1969
Ind. No. 920-68

Defendant Frank Palmieri indicted with one, Michael Blake, for the crime of murder, on his motion made March 17, 1969 was granted severance. After trial by jury, a verdict of guilty of manslaughter under the first count of the indictment was found against codefendant Blake on March 28, 1969. Defendant Palmieri on May 26, 1969, after a jury trial, was found guilty of murder under both counts of the indictment.

Defendant Palmieri here seeks a transcript of the entire trial of his codefendant Blake, uring that he cannot obtain them because of his indigence and that he requires them for the protection of his constitutional rights.

Defendant relies on *People v. Montgomery* (18 N Y 2d 993) in which the court reversed defendant's conviction and remitted the case to the trial court for new trial on the ground that an indigent defendant is entitled to the minutes of a preliminary hearing. The court referring to the Code of Criminal Procedure, section 206, said at page 994:

> "There is no doubt that section 206 affords one who is capable of paying for it an absolute right to a transcript of

> the preliminary hearing. Thus, the State cannot, consonant with the equal protection clause of the State and Federal Constitutions, deny a defendant, prior to trial, access to a transcript of a preliminary hearing because of his inability to pay (cf. *People v. Jaglom,* 17 N Y 2d 162, 165). We hold, therefore, that when a defendant requests a transcript and when that request is accompanied by an affidavit of indigency, the State must honor that request."

Clearly the relief sought herein can under no view of the facts be regarded as coming within the purview of *Montgomery, supra.* In *Montgomery,* the *defendant* was denied a copy of the minutes of a preliminary hearing which were necessary and pertinent to his defense while the same minutes by statute would have been available to him as a defendant if he was able to pay for them. Here, defendant Palmieri seeks not the minues of his own trial, which were given to him at his request, but instead the minutes of the trial of his codefendant which, as noted above, was held separately at the special insistence and request of the defendant.

The defendant's contentions are not supported by any statute nor any decision which would entitle him to minutes of a trial in which he was not a participant. Of a certainty this request may be placed before any appellate tribunal for its determination.

Accordingly, the motion is denied.

Order entered herein.

The clerk of the court is directed to send a copy of the decision and order to the attorney for the defendant Palmieri.

s/ E. Thompson
J.S.C.